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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN J. CARDEN, a/k/a, JAMES J. CARDEN, and GLORIA (EUSEK) CARDEN,

Petitioners,

vs.

THE STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioners, JOHN J. CARDEN a/k/a JAMES J. CARDEN, and GLORIA (EUSEK) CARDEN, respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review a final order reversing the District Court's order granting petitioners' habeas corpus relief on the ground that the petitioners have failed to exhaust their State Court remedies.

QUESTIONS PRESENTED FOR REVIEW

On May 12, 1978, the United States District Court for the District of Montana, Helena Division, issued a writ of

habeas corpus enjoining the State of Montana from further prosecution of petitioners who were charged with a six count amended information filed by the State of Montana on the grounds the State of Montana had denied petitioners their constitutional right to a speedy trial. On appeal by the State of Montana, the United States Court of Appeals for the Ninth Circuit reversed the decision of the District Court and dismissed the writ on the grounds that petitioners had failed to exhaust their State Court remedies. The questions presented here relate solely to the doctrine of exhaustion. Those questions are:

1) When the State prosecutor in answer to a petition for writ of habeas corpus in a Federal District Court admits that the petitioning defendants have exhausted their State Court remedies on the constitutional issue before the Court and proceeds in litigating the merits of the petition, has the State not waived its right to challenge the District Court's jurisdiction on the ground that petitioners have failed to exhaust their State Court remedies?

2) Is the exhaustion requirement in habeas corpus proceedings arising from State Court prosecutions a matter of comity or of jurisdiction?

3) When petitioners, prior to filing an application for a writ of habeas corpus in the United States District Court, have fully and finally presented the constitutional question to the highest Court in the State and from which there is no further State forum to present that claim, have they not in fact exhausted their State Court remedies?

4) Since the issue of exhaustion was never raised by the State of Montana in the District Court proceedings, may a Court of Appeals decide the appeal before it on an issue not presented to the Court below?

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The caption in this cause lists the names of all parties.

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NINTH CIRCUIT. The opinion of the Court below in this case [Appendix pp. A1-A6] has not yet been reported.

The order denying petitioners' timely filed petition for rehearing en banc [Appendix p. A19] has not yet been reported.

DISTRICT COURT. The memorandum and opinion of the District Court granting petitioners' application for a writ of habeas corpus and other appropriate relief [Appendix pp. A7-A18] was not reported.

The memorandum and order denying the State of Montana's motion to amend findings and judgment or in the alternative for a new trial [Appendix pp. A20-A22] was not reported.

JURISDICTION

The judgment of the Court of Apeals [Appendix pp. A1-A6] was filed on the 20th day of June, 1980, a timely petition for rehearing was denied on September 8, 1980 [Appendix p. A19]. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the exhaustion requirement in habeas corpus proceedings by persons in custody pursuant to a judgment of a State Court in violation of the Constitution of the laws or treaties of the United States.

The statute describing the exhaustion requirement in

habeas corpus proceedings is 28 U.S.C. §2254, which reads in pertinent part as follows:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

STATEMENT OF THE CASE

Rule 21 1(g) of the Supreme Court Rules mandates that the statement of the case contain only the facts material to the consideration of the questions presented. Since the finding of the District Court that the petitioners had been denied their Federal Constitutional rights to a speedy trial was not appealed by the State of Montana to the Ninth Circuit Court of Appeals, the facts supporting the District Court's findings on that issue are not pertinent to this application. The only issue raised by the State of Montana on appeal to the Circuit Court and the only issue ruled upon by the Circuit Court was the issue of exhaustion of State Court remedies. Therefore, petitioners will limit the facts presented in this application to the facts supporting their claim that they have exhausted their State Court remedies.

On August 8, 1977, CARDENS, petitioners herein, filed

with the United States District Court for the District of Montana, Helena Division, a petition for a writ of habeas corpus and other appropriate relief [Appendix pp. A23-A62] that they had been denied their Federal constitutional right to a speedy trial; that they had further been denied the Fifth Amendment rights under the United States Constitution in that they had been victims of a bad faith prosecution by the State of Montana; and that they had been denied equal protection of the laws under the color of State authority contrary to the Fourteenth Amendment to the United States Constitution. In Paragraph VII of their petition [Appendix pp. A23-A62] CARDENS alleged that they had exhausted their State Court remedies. CARDENS specifically alleged as follows:

> "That the petitioners have exhausted their remedies available in the Courts of the State of Montana, by moving the District Court of Lewis and Clark County for dismissal of the information charging them with crimes against the State of Montana for failure to afford them their constitutional right to speedy trial. This motion was granted on the 28th day of July, 1976. The State of Montana appealed the District Court's decision dismissing the information to the Montana Supreme Court which was originally heard on the 22nd day of October, 1976, and re-argued on the 9th day of February, 1977. On the 25th day of May, 1977, the Montana Supreme Court reversed the District Court ruling holding that petitioners were not denied their constitutional right to a speedy trial under the Constitution of the State of Montana or the Constitution of the United States. Rehearing was denied on the 4th day of August, 1977.***"

The State of Montana filed its answer to petition for writ of habeas corpus on the 8th day of September, 1977 [Appendix pp. A23-A62]. In its answer the State of Montana admitted

that CARDENS had exhausted their remedies available in the State Courts. Specifically the State of Montana answered as follows:

> "6. Respondents admit that the Petitioners have exhausted their remedies available in the State Court as to the period of time from the filing of the information until the Motion to Dismiss for lack of speedy trial was made on May 11, 1976, but deny that the Petitioners have exhausted their remedies for any period of time thereafter; Respondents admit that the Montana Supreme Court has expressly ruled that these Petitioners were not denied their constitutional right to a speedy trial under the constitution of the state or the United States, for the time period of December 20, 1974, through May 11, 1976."

Furthermore, in its answer [Appendix pp. A63-A67] the State of Montana affirmatively alleged that CARDENS had exhausted their State Court remedies and that it was "prepared to proceed" in the District Court on the issue presented by the CARDENS' application.

Following extensive discovery under Rules 6 and 7 of the "RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS", effective February 1, 1977, oral argument and the submission of briefs the District Court issued its Memorandum and Order [Appendix pp. A7-A18] on May 12, 1978, granting CARDENS a writ of habeas corpus. In its order the District Court specifically addressed the exhaustion issue and held that the admission by the State of Montana that CARDENS had exhausted their State Court remedies was fatal. The District Court said in pertinent part:

> "***Here, the State concedes that all state remedies are exhausted for the period in question. This concession is fatal to the State's argument for abstention and against

> the stay, since it necessarily implies that the interest underlying the exhaustion requirement has been vindicated. If no further state forum exists in which the petitioner can present his constitutional claim, the State's interest in passing on constitutional questions arising from state cases has been fully protected."

On July 25, 1978 the District Court denied the State of Montana's motion to amend findings and judgment of the District Court or in the alternative for a new trial [Appendix pp. A68-A71]. Thereafter on the 18th day of August, 1978, the State of Montana filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit. The State of Montana did not appeal the District Court's order granting the CARDENS a writ of habeas corpus on its merits but rather appealed only the procedural issues of exhaustion, permitting discovery, and granting a stay of State Court proceedings.

The first time the State of Montana raised the exhaustion issue was after the District Court had granted the CARDENS their writ of habeas corpus. In their answer brief filed with the Ninth Circuit Court of Appeals the CARDENS strongly objected to raising the exhaustion issue at this stage of the case. Quoting from pages 5-6 of their brief CARDENS voiced their objections as follows:

> "*** Now, after the petition for habeas corpus has been fully litigated on its merits and, more importantly after it was granted, the State of Montana desires to change its theory of the case. For the first time it raises the procedural rule of failure to exhaust state remedies even though it had admitted throughout the District Court proceedings that the Cardens had in fact fulfilled the exhaustion requirements set forth in 28 U.S.C. §2254 and by case law U.S.C. §2241. *Moore v. DeYoung,* 515 F.2d 437, 442 (C.A.3rd-1975). This new theory of the case comes at a time after the parties and the court

have expended substantial resources in litigating the merits of the petition. This action by the State of Montana constitutes a substantial turnabout in the theory relied upon by it during the District Court proceedings. Moreover, it violates the universally recognized doctrine of adherence to theory pursued below. *Roberson v. U.S.,* 382 F.2d 714 (9th Cir.-1967)."

On June 20, 1980, the Ninth Circuit Court of Appeals filed its Opinion reversing the District Court's Order granting CARDENS' habeas corpus relief on the grounds that CARDENS had not exhausted their State Court remedies [Appendix pp. A1-A6].

On September 8, 1980, the Ninth Circuit Court of Appeals denied CARDENS' timely filed petition for rehearing en banc.

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

I.

THE NINTH CIRCUIT COURT OF APPEALS' DECISION IN THIS CASE ON THE QUESTION OF EXHAUSTION IS IN DIRECT CONFLICT WITH DECISIONS RENDERED BY THE FOURTH, FIFTH AND SEVENTH CIRCUIT COURT OF APPEALS.

On August 8, 1977, CARDENS filed with the United States District Court for the District of Montana, Helena

Division, a petition for writ of habeas corpus and other appropriate relief [Appendix pp. A23-A62]. In paragraph VII of their petition CARDENS alleged that they had exhausted their remedies available in the Courts of the State of Montana on the constitutional claims raised in their petition.

On September 8, 1977, the State of Montana filed its "Answer to Petition For Writ of Habeas Corpus", [Appendix pp. A63-A67], in the District Court. In paragraph 6 of its answer the State of Montana admitted that the CARDENS had exhausted their remedies available in the State Courts on the constitutional claim presented in the petition.

Following the filing of the petition and answer the parties engaged in extensive discovery under Rules 6 and 7 of the "RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS". Briefs were submitted and oral argument was held.

On May 12, 1978, the District Court issued its "Memorandum and Order" [Appendix pp. A7-A18], granting CARDENS a writ of habeas corpus. In its order the Court addressed the exhaustion issue and held that the State of Montana's concession that the CARDENS had exhausted all State remedies for the period in question on the constitutional claim presented in the petition was fatal.

Only after the parties and the Court expended substantial resources in litigating the merits of the petition and only after the District Court ruled on the merits did the State of Montana begin to retract its admission that the CARDENS had exhausted their State Court remedies.

On appeal the Ninth Circuit Court of Appeals reversed the District Court's order granting CARDENS a writ of habeas corpus on the grounds that they had failed to exhaust their State Court remedies [See Opinion, Appendix pp. A1-A6].

In the case of *Houston v. Estelle*, 569 F.2d 372 (5th Cir.-1978), rehearing denied 572 F.2d 320, the Fifth Circuit Court of Appeals faced an almost identical case on the issue of exhaustion. The Fifth Circuit Court held that because the State of Texas had admitted in its answer to the petition for habeas corpus relief filed by the petitioners, it had waived the exhaustion requirement. *Houston, supra,* 569 F.2d at pp. 375-376.

In *Houston, supra,* a State Court prisoner petitioned the United States District Court for the Western District of Texas for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Following an evidentiary hearing the District Court denied the writ. Petitioner appealed to the Fifth Circuit Court of Appeals. On appeal the Court was compelled to determine whether the petitioner had exhausted his State remedies before making application for Federal habeas corpus relief.

The Court found that the State of Texas has never raised any procedural objection to Federal consideration at the District Court level and upon examination of the State's answer to the petition it had stated explicitly (569 F.2d at 372):

> "At this time, respondent does not contend that petitioner has failed to exhaust his state remedies. Although neither allegation now presented was brought up in his state writ, both were presented on direct appeal."

The *Houston* Court also found that the State had fully participated in the District Court proceedings and acquiesced in the expenditure of substantial resources in litigating the case on its merits.

In setting forth the principles governing habeas corpus exhaustion requirements and the Court's jurisdiction over

Federal habeas corpus claims the Court said in part, at 569 F.2d 375-376:

> "In deciding whether the merits of *Houston's* claim are properly before us, we must be mindful that *the question is not one of federal power, but of equitable discretion. Francis v. Henderson,* 425 U.S. 536, 96 S. Ct. 1708, 1710; 48 L. Ed. 2d 149 (1976); *Fay v. Noia,* 372 U.S. 391; 83 S. Ct. 822, 826-27, 9 L. Ed. 2d 837 (1963); *see Wainwright v. Sykes,* 433 U.S. 72, 97 S. Ct. 2497, 2511 n.4, 53 L. Ed. 2d 594 (Stevens, J., concurring); *Id* at 25134 n.2 (Brennan, J., dissenting).
>
> * * *
>
> *Since the exhaustion requirement is non-jurisdictional, it may be waived by the state, Collins v. Estelle,* 474 F.2d 988, 989, (5th Cir.-1973), *and we may give consideration to the expenditure of federal judicial resources below. Thomas v. Arizona,* 356 U.S. 390, 78 S. Ct. 885, 886-87 n.1, 2 L. Ed. 2d 863 (1958)." (*Emphasis Supplied*).

Applying those principles to the facts in *Houston* the Court held:

> "Thus, the state has never even made the argument which prevails, if at all, only as a matter of comity and has instead acquiesced in the expenditure of substantial resources in litigating the merits. In these circumstances, we hold that *Houston's* claim is properly before us. *To hold otherwise, we think would be to elevate a rule of equitable discretion, into one of jurisdiction.*" (*Emphasis Supplied*).

Clearly, the Fifth Circuit Court of Appeals' decision in *Houston* and the Ninth Circuit Court of Appeals in the present case are in conflict. The Fifth Circuit Court of Appeals holds that if the State admits exhaustion and proceeds to litigate the petition on its merits expending substantial resources of time then the reasons for the

exhaustion requirement have been met. The Ninth Circuit Court of Appeals holds that exhaustion of State Court remedies is an absolute requirement even though the State may have admitted exhaustion and even though the parties and the Court have expended substantial resources in litigating the merits of the petition.

Furthermore, the Fourth Circuit Court of Appeals in *Jenkins v. Fitzberger,* 440 F.2d 1188 (4th Cir.-1971) held that a State may waive the exhaustion requirement on the grounds that the exhaustion requirement of 28 U.S.C. §2254 is a matter of comity and *not* jurisdiction.

Similarly, the Seventh Circuit Court of Appeals in *United States Ex Rel. Lockett v. Illinois Parole and Pardon Board,* 600 F.2d 116, 117-118 (7th Cir.-1979) implied that it would not have dismissed a habeas corpus proceeding on the grounds petitioners had failed to exhaust State Court remedies if the State had explicitly waived the exhaustion requirement and had participated in a hearing in the merits of the petition.

In its opinion in *United States Ex Rel. Lockett, supra,* 600 F.2d at 117-118, the Seventh Circuit Court of Appeals analyzed decisions rendered by the various Circuit Courts of Appeals on the issue. In its analysis the Court found that the Fifth and Fourth Circuits have said that a State may waive the exhaustion requirement. On the other hand it found that the First, Second and Eighth Circuits have said that the exhaustion requirement cannot be waived by counsel. However, the Court found that the Second and Eighth Circuit Courts of Appeals may in appropriate circumstances not require exhaustion if there has been a full hearing below and exhaustion would be wasteful of judicial resources. The

Court said, *United States Ex Rel. Lockett, supra,* 600 F.2d at 117-118:

> "The Second Circuit has said that (w)e do not consider that the statutory requirement of exhaustion of state remedies can be waived by the State." *United States Ex Rel. Sostre v. Festa,* 513 F.2d 1313, 1314 n.1 (2d Cir. 1975); cf. *United States Ex Rel. Johnson v. Vincent,* 507 F.2d 1309 (2d Cir. 1974); *United States Ex Rel. Wissenfeld v. Wilkins,* 281 F.2d 707 (2d Cir. 1960). *Since the exhaustion requirement is not jurisdictional, United States Ex Rel. Wilson v. Rowe,* 454 F.2d 585 (7th Cir. 1971), *certiorari denied,* 406 U.S. 909, 92 S. Ct. 1618, 31 L. Ed. 2d 820 (1972), *an appeals court may in appropriate circumstances decline to dismiss despite the failure to exhaust, as where there has been a full hearing below and exhaustion would be "wasteful of judicial energy." Sostre, supra.* In *Howard v. Sigler,* 325 F. Supp. 278 (D. Neb. 1971), reversed on other grounds, 454 F.2d 115 (8th Cir. 1972), the State never raised the exhaustion issue at all and participated in a full federal evidentiary hearing on the merits. The district court, raising the exhaustion issue sua sponte, felt that the State's participation in that prior hearing foreclosed it from subsequently raising the exhaustion defense. *Where there has not been a prior hearing and where the State has not explicitly waived the exhaustion requirement, the Eighth Circuit rule is to require exhaustion. Blackwell v. Wolff,* 454 F.2d 48 (8th Cir. 1972). Compare *Jenkins v. Fitzberger, supra,* and *Houston v. Estelle, supra,* where the waiver was explicit." (*Emphasis Supplied*).

In the present case the State of Montana explicitly waived the exhaustion requirement in paragraph 6 of its answer to the petition [Appendix pp. A63-A67]. Moreover in its answer the State of Montana declared [Appendix pp. A63-A67]:

> "***The Respondents [State of Montana] are prepared to proceed in this Court on the issue presented by the

> Petitioners as confined to the time period encompassed by the Montana Supreme Court opinion, i.e., December 20, 1974 to May 11, 1976, and as to that time period, would ask that this Court dismiss their Petition for the reasons set forth by the Montana Supreme Court."

Furthermore, extensive discovery was undertaken by the parties including interrogatories, depositions and production of documents. Finally, a full hearing was held in District Court at which time attorneys for both parties presented arguments. The District Court then took the case under advisement, reviewed the briefs and other documentation and prepared its written Memorandum and Order granting petitioners a writ of habeas corpus. [Appendix pp. A7-A18]. This required the expenditure of substantial judicial resources by the District Court.

There can be no question that the several Circuit Courts of Appeals are in disagreement as to whether or not the exhaustion requirement can be waived by the State. However, the Second, Fourth, Fifth, Seventh and Eighth Circuit Courts of Appeals appear to agree that when there has been an explicit waiver by the State and the State has participated fully in litigating the merits of the petition requiring the expenditure of substantial judicial resources by the District Court as was done in the present case, the Court may properly decline to dismiss the case.

Since the several Circuit Courts of Appeals have rendered decisions in conflict with the Ninth Circuit Court of Appeals in the present case, this issue is properly before this Court. CARDENS respectfully request that this Court issue a writ of certiorari in this case to prevent future confusion and to prevent the extreme hardship imposed upon them by the Ninth Circuit Court's decision.

II.

PETITIONERS HAVE EXHAUSTED THE REMEDIES AVAILABLE IN THE COURTS OF THE STATE OF MONTANA ON THE CONSTITUTIONAL CLAIMS PRESENTED BEFORE PETITIONING THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, HELENA DIVISION, FOR A WRIT OF HABEAS CORPUS.

Title 28 of the United States Code Section 2254 sets forth the exhaustion requirement in habeas corpus proceedings arising out of State Court prosecution. 28 U.S.C. §2254 provides in pertinent part:

> "(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears that the applicant has exhausted the remedies available in the Courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the Courts of the State, within the meaning of this section, *if he has the right under the law of the State to raise, by any available procedure, the question presented.*" (*Emphasis Supplied*).

CARDENS in the present case did in fact exhaust their State Court remedies on the constitutional claim that they had been denied their United States Constitutional right to a speedy trial.

On December 20, 1974, the Attorney General of the State of Montana filed a 19 count information against the CARDENS in State District Court. After deliberate tactical

delays on the part of the State of Montana, trial was set to be held on June 17, 1976. (See District Court's Memorandum and Order - Reason for Delay [Appendix pp. A7-A18]).

On May 11, 1976, CARDENS moved the State District Court to dismiss the information for lack of a speedy trial. On July 28, 1976, the State District Court granted CARDENS motion to dismiss for the State's failure to grant CARDENS their constitutional right to a speedy trial. The State of Montana appealed the order of dismissal to the State's highest Court - The Montana Supreme Court. The Montana Supreme Court reversed the District Court's order. CARDENS' timely petition for rehearing before the Montana Supreme Court was denied on July 27, 1977.

When the Montana Supreme Court reversed the District court's order dismissing the information on the grounds CARDENS had been denied their constitutional right to a speedy trial and after denying CARDENS request for rehearing, *there was no available procedure under the laws of the State of Montana to raise the constitutional question presented.* 28 U.S.C. §2254(c). The issue was *res judicata* having been finally determined by the highest Court in the State.

Clearly, the CARDENS had fully exhausted their State Court remedies on the constitutional question presented to the United States District Court in their petition for a writ of habeas corpus. The underlying reasons for declining jurisdiction were not present.

CONCLUSION

For the foregoing reasons, Petitioners/CARDENS' Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

KNIGHT, DAHOOD, McLEAN & EVERETT

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